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UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Competitive Product Prices
Inbound Competitive Multi-Service Agreements with
Foreign Postal Operators
Royal PostNL BV – United States Postal Service
Bilateral Agreement (MC2010-34)
Negotiated Service Agreement

Docket No. CP2013-24

PUBLIC REPRESENTATIVE COMMENTS ON POSTAL SERVICE NOTICE OF FILING AN ADDITIONAL INBOUND COMPETITIVE MULTI-SERVICE AGREEMENTS WITH FOREIGN POSTAL OPERATORS 1 NEGOTIATED SERVICE AGREEMENT (WITH ROYAL POSTNL BV)

(December 14, 2012)

The Public Representative hereby provides comments pursuant to Order No. 1566.[1] In that Order, the Commission established the above referenced docket to receive comments from interested persons, including the undersigned Public Representative, on the Postal Service's Notice of its entry into an additional bilateral agreement for inbound competitive services with Royal PostNL BV (PostNL) of the Netherlands.[2] The Notice concerns the inbound portion of a bilateral agreement with the PostNL (PostNL Agreement), which the Postal Service seeks to include within the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 product. Notice at 1.

In Order No. 546, the Commission approved the addition of the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 product to the competitive product list, and included within that product an agreement with Koninklijke

[1] PRC Order No. 1566, Notice and Order Concerning Additional Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 Negotiated Service Agreement (With Royal PostNL BV), December 5, 2012.
[2] Notice of the United States Postal Service of Filing Additional Functionally Equivalent Inbound Competitive Multi-Service Agreement with a Foreign Postal Operator, December 4, 2012 (Notice), at 1.

TNT Post BV and TNT Post Pakketservice Benelux BV (TNT Agreement).[3] In Order No. 840, the Commission accepted the Postal Service's designation of the TNT Agreement as the baseline agreement for purposes of determining whether future agreements are functionally equivalent.[4] The Commission subsequently approved the addition of bilateral agreements with the China Post Group (China Post 2011 Agreement) and Posten Norge AS (Norway Post Agreement) within the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 product.[5] More recently, the Commission approved bilateral agreements with the Australian Postal Corporation (Australia Post Agreement) and the Canada Post Corporation (Canada Post Agreement) for inclusion within the product,[6] as well as an extension of the Norway Post Agreement.[7]

The PostNL Agreement establishes prices and classifications for the delivery of inbound Air Parcel Post and inbound Express Mail Service (EMS) in the United States. *Id.* at 4. The instant agreement is the successor to the TNT Agreement, which was automatically renewed on October 1, 2012. *Id.* at 3, Note 5. The PostNL Agreement is intended to become effective January 1, 2013, and remain in effect for two years unless terminated sooner. *Id.* at 2 – 3; Attachment 1, at 7.

COMMENTS

The Public Representative has the reviewed the PostNL Agreement and the supporting financial model filed under seal that accompanied the Postal Service's

[3] PRC Order No. 546, Order Adding Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 to the Competitive Product List and Approving Included Agreement, Docket Nos. MC2010-34 and CP2010-95, September 29, 2010.
[4] PRC Order No. 840, Order Concerning an Additional Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 Negotiated Service Agreement, Docket No. CP2011-69, September 7, 2011, at 5.
[5] PRC Order No. 859, Order Concerning An Additional Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 Negotiated Service Agreement, Docket No. CP2011-68, September 16, 2011; PRC Order No. 840, *supra.*
[6] PRC Order No. 956, Order Concerning An Additional Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 Negotiated Service Agreement, Docket No. CP2012-1, November 9, 2011; PRC Order No. 1088, Order Adding an Additional Bilateral Agreement to Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 Product, Docket No. CP2012-4, December 30, 2011.
[7] PRC Order No. 1487, Order Approving Addition of Modified Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 Negotiated Service Agreement, Docket No. CP2012-60, September 28, 2012.

Notice. Based upon that review, the Public Representative concludes that the PostNL Agreement is not functionally equivalent to the baseline TNT Agreement. The PostNL Agreement differs in one important respect from the TNT Agreement. Nevertheless, the PostNL Agreement covers its attributable costs as required by 39 U.S.C. § 3633 and exceeds the required minimum cost coverage applicable to the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators product established by the Governors.[8] That said, the PostNL Agreement may not be financially remunerative to the Postal Service. Although the financial model shows a positive cost coverage, it may not be sufficient in the event the Postal Service's estimates of revenue and cost are more optimistic than actual financial results.

Functional Equivalence. The Postal Service asserts that the "PostNL Agreement is substantially similar to the inbound portion of the TNT Agreement in terms of the products being offered under the contract and the contract's cost characteristics." Notice at 5. In this regard, the PostNL Agreement, like the TNT Agreement, involves the delivery of inbound Air Parcel Post and EMS in the U.S. *Id.* at 3.

One difference between the PostNL Agreement compared to the TNT Agreement concerns inbound Surface Parcel Post, which is no longer a service offering. In addition, the PostNL Agreement includes changes with respect to "performance metrics for late delivery, late information transmission, and missing information, with associated penalties" established in the TNT Agreement.[9]

The Postal Service identifies other differences, including: an additional paragraph committing the parties to revise Accounting Business Rules related to settlement payments (Article 3, Oversight and Effective Date); the addition of Article 8, Customs Inspection; revisions and additional details concerning termination (Article 9, Termination); changes to the resolution of differences (Article 10, Dispute Resolution); identification of information to be provided to the Commission by the Postal Service

[8] *See* Request of Untied States Postal Service to Add Inbound Competitive Multi-Service Agreements with Foreign Postal Operators to the Competitive Product List, and Notice of Filing (Under Seal) of Enabling Governors' Decision and Negotiated Service Agreement, Docket Nos. MC2010-34 and CP2010-95, August 13, 2010, Attachment 2 (Request).
[9] Request at 4.

pursuant to law (Article 14, Confidentiality Requirements); changes to clarify what constitutes the entire agreement and include references to the TNT Agreement and the Exprès Service Agreement (Article 22, Entire Agreement); stating that the agreement will remain in effect for two years (Article 23, Term); the addition of Article 24, Intellectual Property, Co-Branding and Licensing, and Article 25, Survival; and, a change in the name of the foreign postal operator from TNT Post to PostNL throughout the instant agreement. *Id.* at 5 – 6.

The Postal Service "does not consider that the specified differences affect either the fundamental service the Postal Service is offering or the fundamental structure of the agreements." *Id.* at 7. The Public Representative agrees that the *differences specified by the Postal Service* do not alter the conclusion that the PostNL Agreement is functionally equivalent to the baseline TNT Agreement. However, the changes to "performance metrics" and "associated penalties" in the PostNL Agreement compared to the TNT Agreement affect the similarity of the cost or market characteristics between the two agreements.[10] Consequently, the Public Representative concludes that the PostNL Agreement is not functionally equivalent to the baseline TNT Agreement.

Requirements of 39 U.S.C. § 3633. Pursuant to 39 U.S.C. § 3633(a), the Postal Service must demonstrate that the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 product covers attributable costs, which precludes the subsidization of competitive products by market dominant products and thereby makes an appropriate contribution to the institutional costs of the Postal Service. In this proceeding, the Postal Service's financial model does not demonstrate that the addition of the PostNL Agreement results in the Inbound Competitive Multi-Service Agreement with Foreign Postal Operators 1 product covering costs as required by 39 U.S.C. § 3633. However, the Postal Service's financial model indicates that the negotiated rates in the modified PostNL Agreement will generate sufficient revenues to cover costs, and therefore will not degrade the cost coverage of the product.

[10] *Compare* the financial model (revised) for the TNT Agreement in Netherlands_Comp_IB_2010.09.22.xls, worksheet tab 14_Proj_Stream_Rev & Cost, Column [A], with the financial model for the PostNL Agreement in Netherlands_Comp_IB_2012.11.14.xls, worksheet tabs 01_Inputs, Note [Adb], and 14_Proj_Stream_Rev & Cost, Column [A].

That said, the estimated cost coverage for the PostNL Agreement appears optimistic, despite the use of a more robust contingency factor in the financial model compared to the TNT financial model.[11] The estimated cost coverage depends heavily upon the reliability of the Postal Service's estimates of revenue and cost, especially for Air Parcel Post, and there is little margin for error. A relatively small error in estimation unfavorable to the Postal Service could result in higher costs or lower revenues. The possibility of unfavorable exchange rates and misestimates of cost suggest that the Postal Service's revenue and cost estimates are unlikely to be realized in the actual financial results.

The Public Representative respectfully submits the foregoing comments for the Commission's consideration.

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[11] *Compare* the TNT financial model (revised) in Netherlands_Comp_IB_2010.09.22.xls, worksheet tab 01_Inputs, at [Ac], with the PostNL financial model in Netherlands_Comp_IB_2012.11.14.xls, worksheet tab 01_Inputs, at [Ac].

In addition, the Excel file FY11 FPS Inbound EMS.xls is identified as the source for inbound EMS volume and weight (Kg) data. All things being equal, the effect of using this source for Inbound EMS data rather than the FY 2011 ICRA is to increase revenues more than costs and thereby improve the inbound EMS cost coverage. With the use the Foreign Post Settlement (FPS) system data, there is a significant change in the volume and weight of inbound EMS reported for the Netherlands as compared to the ICRA. This Public Representative has previously objected to the use of FY 2011 inbound EMS data from FPS system. For the Public Representative's reasoning, *see* Public Representative Comments on Postal Service Notice of Filing Changes in Rates Not of General Applicability for Inbound International Expedited Services 2, Docket No. CP2012-52, August 27, 2012, at 6-7.